IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7410 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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H.H.ACHARYA SHRI DEVENDRAPRASADJI KELAVANI & 1 - Petitioner(s)
Versus
PROF. H.C.DAVE & 2 - Respondent(s)

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Appearance :
MS DHARA M SHAH for Petitioner(s) : 1 - 2.
RULE SERVED for Respondent(s) : 1, 3,
MR SHAILESH C PARIKH for Respondent(s) : 1,
MRS VD NANAVATI for Respondent(s) : 2,
MRS KRINA CALLA, AGP for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 07/12/2007

ORAL JUDGMENT

1. With the consent of the learned advocate appearing for both the sides, the matter is finally heard.

2. The short facts of the case appears to be that the services of the respondent No.1 was terminated without prior approval of the Vice Chancellor of the University and the said decision of termination was challenged before the Tribunal by the respondent No.1. The Tribunal initially had granted stay against termination. However, there is no dispute between the petitioners herein and the respondent No.1 on the aspects of joining of the duty. It is an admitted position that the respondent No.1 was not permitted to join the duty or in any case, the respondent No.1 did not work pursuant to the interim order passed by the Tribunal. The Tribunal ultimately, after hearing both the sides, declared the termination illegal and directed for reinstatement with full backwages and the said order of the Tribunal dated 07.02.2007 is under challenge in the present petition.

3. This Court (Coram: H.K. Rathod, J.) on 22.03.2007, had passed the following order:

> *"1. Heard learned Senior Advocate Mr.SN Shelat with Ms. Dhara M. Shah, learned Advocate for the petitioner. Two Draft Amendments placed on record are allowed Petitioner is directed to carry out*

amendment within two days from today and to supply amended copy of petition to the respondents.

2. I have considered the submissions made by the learned Senior Advocate Mr. S.N. Shelat on behalf of the petitioner. Submissions made by the learned Sr. Advocate Mr. Shelat are raising the contention only against the relief granted by the Tribunal in respect of back wages for an interim period. No contention has been raised against the relief of reinstatement which has been granted by the Tribunal. According to the learned Sr. Advocate Mr. Shelat,during the period for which back wages were granted by the Tribunal, the respondent was residing abroad and not in India, therefore, there was no occasion for the respondent to make himself available for work with the petitioner. Therefore, according to him, back wages for the aforesaid period is the error committed by the Tribunal. I have considered the question and contention raised by the learned Sr. Advocate Mr. Shelat which would require detailed examination.

3. Hence Rule. Ad. Interim relief in terms of para 10(BB). Notice as to interim relief returnable on 24.4.2007."

Thereafter, on 09.08.2007, the following order was passed:

"1. Heard learned Senior Advocate Mr.S.N.Shelat with learned advocate Ms.Dhara M. Shah appearing for the petitioners and learned advocate Mr.Shailesh Parikh for the respondent No.1 as well as learned Assistant Government Pleader Ms.Sandhya Natani for the respondent No.3.

2. I have considered the submissions made by the learned advocates appearing for

the respective parties. The Tribunal has passed the following order:

> *"Having regard to all the facts and circumstances of the case, I hereby feel it proper to confirm the interim relief, which was granted earlier and so quash and set aside the order of termination of the Applicant with no order as to costs in consonance with the orders of this Tribunal passed dated 29.12.2000 & 17.9.2004, both after considering the facts and legality of the matter. Further, I hold that the Applicant is entitled to continue in the services of the Respondent college till his retirement date and also for salary for the period he was terminated from the services of the Respondent college and reinstated by the order of this Tribunal. Also, I hereby give direction to the Respondent Nos.1 and 2 to pay salary with arrears to the applicant within 2-3 weeks after the receipt of this order and the college is grantable then the Respondent college has to send the salary bill with arrears of the Applicant to the Respondent No.4 – C.H.E. And the C.H.E. has to grant the said bill within two weeks after they receive the proposal from the Respondent management. So, in view of the above, the matter stands disposed of as allowed with no order as to costs."*

3. Learned Senior Advocate Mr.Shelat appearing for the petitioners submitted that salary bill with arrears is already sent to the respondent No.3 on 19th February 2007 in compliance of the order passed by the Tribunal. Therefore, now it is the duty of the respondent No.3 to pass appropriate

orders in respect of the proposal of salary bill sent by the petitioners. Learned Assistant Government Pleader Ms.Sandhya Natani appearing for the respondent submitted that till date no order is passed by the respondent No.3.

3. Therefore, considering the aforesaid facts, it is directed to the respondent No.3 to pass appropriate orders in respect of the salary bill with arrears sent by the petitioner on 19th February 2007 within a period of one month from the date of receiving copy of this order. Accordingly, ad interim relief granted by this Court on 22nd March 2007 is modified to that extent. The matter is adjourned to 10th September 2007.

Thereafter, on 01.11.2007, the following order was passed:

"Today, learned AGP Mr.Oza for respondent No.3 places on record the copy of order dated 29.10.2007 whereby the State Government has decided to pay salary to the respondent No.1 – Mr.H.C.Dave for the period 11.2.1998 to 23.3.2001. Said order dated 29.10.2007 is taken on record.

Therefore, the State Government is directed to pay the aforesaid amount on or before 23.11.2007, preferably before Diwali festival.

In pursuance to the direction of this Court dated 29.10.2007, Mr.J.M.Bukhari, Senior Superintendent is personally present in the Court.

Learned Senior Advocate Mr.S.N.Shelat for the petitioner submitted that if the said amount of salary as referred above is to be recovered from grant which is available to the petitioner, then it creates

some difficulty for the petitioner and it is also operating against the order passed by the Tribunal.

In light of the aforesaid submissions, the matter is adjourned to 23.11.2007."

4. It appears that thereafter, in compliance to the above referred order passed by this Court, the order dated 29.10.2007 has been passed by the Joint Director of Education (Colleges), whereby the salary for the period from 11.02.1998 to 23.03.2001, is sanctioned as per the pay-bill submitted by the college authorities and is also ordered to be disbursed.

5. However, in the said order, it is further observed that the amount of salary which is paid for the aforesaid period of 11.02.1998 to 23.03.2001, shall be recoverable from the maintenance grant of the institution/management.

6. It is not in dispute that the reinstatement is not given effect and as such, it is an admitted position that the respondent No.1 has been reinstated in the service pursuant to the order passed by the Tribunal dated 24.03.2001.

7. The petitioners by preferring Civil Application No. 14980/07, prayed to amend the petition for inserting the challenge qua recovery to be effected from maintenance grant of the institution.

8. Therefore, it appears that the order passed by

the Tribunal for reinstatement and for awarding the backwages/full salary for the period during which the teacher remained outside the service, were initially the subject matter of the petition.

9. As the reinstatement is already effected, the challenge against the order passed by the Tribunal so far as it relates to the reinstatement of the respondent No.1 is concerned, would not survive since the petitioners have accepted that part of the order and the reinstatement has been granted.

10. Mr. Shelat, learned counsel appearing for the petitioners submitted that even for the backwages, as such the direction was issued by this Court and the same has been sanctioned by the Government, but if the amount is to be recovered from the maintenance grant of the petitioner institution, the petitioner would like to pursue the matter for the backwages as ordered by the Tribunal and the petitioners would also be desirous to challenge the decision of the respondent authority of recovering the amount of backwages from the maintenance grant of the petitioners.

11. So far as the awarding of the backwages by the Tribunal is concered, it has come on record that the respondent No.1 was out of country for some period and this Court has called upon the

respondent No.1 to produce the copy of the passport showing the authenticity of the period during which he was outside the country and such documents are produced together with the additional affidavit in reply filed by the respondent No.1 today. The perusal of the said documents show that for the period of about 1 year and 11 month months, out of the total period during which the respondent No.1 remained out of the service, the respondent No.1 was out of country and he was in the country for the period of about 13 months only.

12. As such, it was required for the Tribunal to examine in detail for not applying the principles of no work no pay while awarding the backwages to the respondent No.1 before the Tribunal. However, it appears that the Tribunal only proceeded on the basis that the termination was illegal and therefore, the backwages could be awarded. I would have examined the matter further, however, keeping in view the admitted position that the respondent No.1 was out of country for a period of about 1 year and 11 months and thereafter, in the country for a period of 13 months, Mr. Parikh appearing for respondent No.1 under the instructions of his client who was present in the Court, declared before the Court that he has no objection if the order passed by the Tribunal for awarding of the backwages is modified to the effect that the

petitioners would not be entitled for the backwages for the period of 1 year and 11 months, out of the period during which the petitioner remained out of service and for which the backwages are awarded by the Tribunal.

13. In view of the aforesaid declaration, no further discussion may be required, suffice it to say that if the person concerned himself is not available in the country for offering himself for work, the same would be one of the major consideration on the part of the Tribunal to decline the backwages atleast during the said period by applying the principle of no work no pay.

14. Since in the present case, the respondent No.1 himself has declared before the Court for not claiming such backwages, I find it proper to leave the matter at that stage.

15. In view of the aforesaid, the order passed by the Tribunal so far as it relates to awarding of backwages, shall stand confirmed for the period during which the respondent No.1 was in the country and shall stand quashed and set aside for awarding of the backwages during the period when the respondent No.1 was out of the country. Since there may not be dispute on the aspects of calculation of the amount of backwages, it is further observed and directed that award of the Tribunal for backwages shall not entitle the

orig. petitioner before the Tribunal, respondent No.1 herein, to claim the backwages for the period of one year and 11 months and for the remaining period only he would be entitled to the backwages.

16. The learned AGP, Mrs. Calla, however declared before the Court under the instruction of the officer that since the earlier order was passed by this Court and based on the same, the order was also passed by the Joint Director of Education, towards for the period from 11.02.1998 to 23.03.2001 part payment of Rs.5,97,799/- by Cheque No. 78266 has been credited in the Bank account of the respondent No.1-orig. Petitioner.

17. If such is the situation, it will be for the petitioner herein to undertake calculation and intimate to the competent authority for excluding the backwages for 1 year and 11 months out of the total amount of backwages from 11.02.1998 to 23.03.2001 within two weeks from today and if the amount already paid has exceeded the entitlement of the backwages by the respondent No.1, appropriate adjustment will have to be given in the pay bill and if surplus amount is paid to the respondent No.1, he will be required to refund the same by depositing in the Treasury Account of the concerned department and upon his failure, it would be open to the

petitioner college and/or the concerned department to recover the same from his future salary.

18. In view of the aforesaid facts and circumstances, the main challenge in the Special Civil Application against the order of the Tribunal shall stand covered.

19. So far as the additional challenge made by the petitioners by way of draft amendment by Civil Application No. 14986/06 is concerned, pertaining to the right of the Government to recover the same from the maintenance grant of the institution, it appears that the said aspect is an independent matter to be examined. If the petitioner is aggrieved by the decision of the Joint Director of Education(College) for recovery of the amount from the maintenance grant of the Government, it will be for the petitioner to challenge such decision independently by separate appropriate proceedings in accordance with law. Therefore, the said aspect is not required to be decided in the present petition.

20. In view of the above, the petition is partly allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs.

(JAYANT PATEL, J.)

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